

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-03-SE-271
)	NAL/Acct. No. 200432100011
DIRECTV, Inc.)	FRN # 0004365367

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 14, 2004**Released: June 18, 2004**

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), we find DIRECTV, Inc. ("DIRECTV")¹ apparently liable for forfeiture in the amount of eighty seven thousand five hundred dollars (\$87,500), the applicable statutory maximum, against DIRECTV for unauthorized repositioning of the DIRECTV 3 satellite ("DIRECTV 3" or "satellite") from the orbit at which it is authorized, and maintenance of that satellite at unauthorized locations, in willful and repeated violation of Section 25.117(a) of the Commission's Rules ("Rules").²

II. BACKGROUND

2. DIRECTV is the licensee of the DIRECTV 3 Direct Broadcast Satellite ("DBS") service satellite. On September 3, 2003, DIRECTV requested special temporary authority ("STA request") to relocate the DIRECTV 3 satellite from a super-synchronous storage orbit 308 kilometers above the geostationary orbit, to a Canadian-assigned Broadcast Satellite Service ("BSS") orbital position at 82° west longitude ("W.L.") and to conduct the telemetry, tracking and command ("TT&C") functions of the satellite for 60 days once DIRECTV 3 was relocated.³ That orbital location is allotted to Canada under the International Telecommunication Union's plans for BSS and associated feeder links in the 12.2-12.7 GHz and 17.3-17.8 GHz bands, respectively. The STA request to relocate DIRECTV 3 was filed to effect an agreement between DIRECTV and Telesat Canada.⁴

3. In the STA request, DIRECTV explained that (1) during relocation of the satellite back into geostationary satellite orbit DIRECTV would not operate the BSS communications payload on the

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, which is a Commission licensee in the high-power DBS service, and a wholly-owned subsidiary of the DirecTV Group, Inc.

² 47 C.F.R. §§ 25.117(a) (no modification of a radio station governed by Part 25 of the Rules which affects the parameters or terms and conditions of station authorization except upon prior Commission grant).

³ DIRECTV, Inc.; *Request for Special Temporary Authority to Relocate DIRECTV 3 to 82° W.L. and to Conduct Telemetry, Tracking and Command ("TT&C") Operations for an Interim Period*, (Sept. 3, 2003) ("STA request" or "September 3, 2003 STA request").

⁴ *Id.* at 1.

satellite; (2) Telesat would operate the satellite at 82° W.L. under authorization from Industry Canada; and (3) once the satellite was relocated, it would be used exclusively by Telesat or its customers to facilitate service to Canadian BSS subscribers.⁵ The STA request was filed on September 3, 2003. The request indicated that the “window” for communicating with the satellite would close on or about September 25, 2003.⁶

4. On September 4, 2003, DIRECTV personnel caused commands to be communicated to reposition the DIRECTV 3 satellite via a series of maneuvers that would have eventually had the satellite on-station and finally positioned at 82° W.L. on or about October 15, 2003.⁷ The satellite was eventually relocated to an orbit at or very near the geostationary satellite orbital arc, and in the immediate vicinity of the 82° W.L. orbital position sought under the STA request. On or about September 29, 2003, counsel for DIRECTV communicated with Commission staff to note the issuance of a Canadian authorization, on September 26, 2003, for operation of DIRECTV 3 at the 82° W.L. location, and to seek approval for the STA. In response to a question from staff concerning whether it was still possible to maneuver DIRECTV 3 as requested, given that the “window” for communications had now passed, counsel for DIRECTV indicated that the drift of the satellite had been altered. Staff then inquired as to whether that action had been authorized. Subsequently, during the week of September 29, 2003, DIRECTV ceased communicating with the DIRECTV 3 satellite, and arranged a meeting with the International Bureau (“IB”) to describe the sequence of events leading to the relocation of the satellite.⁸ This meeting took place on October 2, 2003.⁹ On October 3, 2003, DIRECTV requested an STA to “execute an additional maneuver to stop the westward movement of the satellite to mitigate any risk of collision with other operational satellites.”¹⁰ IB orally granted this limited STA request on October 3, 2003.¹¹

5. In a letter to IB dated October 9, 2003, DIRECTV acknowledged that its movement of the DIRECTV 3 satellite on September 4, 2003, was not authorized by the Commission and indeed was

⁵ *Id.* at 2.

⁶ *Id.* at 1. At an altitude of 308 kilometers above the geostationary satellite orbit, a satellite drifts westward at a rate of slightly less than three degrees in longitude per day. Thus, there is a limited “window” of time in which it is possible for an Earth station in the United States to communicate with the satellite.

⁷ See Letter from Gary M. Epstein, Counsel for DIRECTV, Inc. to Thomas S. Tycz, Chief, Satellite Division, International Bureau, Federal Communications Commission 3 (Oct. 9, 2003) (“Status Letter”).

⁸ Status Letter at 3.

⁹ *Id.*

¹⁰ *Id.* at 4. See DIRECTV, Inc.; *Request for Special Temporary Authority to Relocate DIRECTV 3 to 82° W.L. and to Conduct Telemetry, Tracking and Command Operations for an Interim Period* (Oct. 3, 2003) (“October 3, 2003 STA Request”). In its October 3, 2003 STA Request, DIRECTV noted that the DIRECTV 3 satellite presently is drifting toward Telesat Canada’s Nimiq-2 satellite at a rate of 0.025°/day and will enter the Nimiq-2 stationkeeping box of 82° W.L. on October 4, 2003. In order to “minimize any risk of collision of these satellites,” DIRECTV requested STA to execute a stationkeeping maneuver to stop the drift of DIRECTV 3, in order to keep it out of Nimiq-3’s orbital box, as well as to preclude DIRECTV 3 from drifting further westward. DIRECTV asserted that “[t]his safety measure is manifestly in the public interest.” *Id.* at 1.

¹¹ See File No. SAT-STA-20031003-00310.

the very purpose of the pending STA.¹² DIRECTV explained that an initial ambiguous communication from a DIRECTV Senior Vice President, Communications Systems, to a subordinate, though “intended to begin planning the process of relocating the satellite,” resulted in a relocation “prior to the grant of the STA request.”¹³ DIRECTV also stated that on or about September 12, 2003, when the Senior Vice President became aware of the movement of DIRECTV 3, “he erred and mistakenly did not attribute significance to the event since the satellite remained in a storage orbit with the communications payload turned off,” thus judging that DIRECTV 3 would not pose a risk to other satellites.¹⁴ DIRECTV further asserted that it has developed a formal policy that will ensure that any future proposed satellite relocations to other orbital positions are vetted and monitored by the DIRECTV General Counsel to ensure compliance with the Commission Rules.¹⁵ IB referred the matter to the Enforcement Bureau for enforcement action.

III. DISCUSSION

6. Under Section 25.117(a) of the Rules, Commission approval is required before a modification may be implemented which affects the parameters or terms and conditions of a Part 25 radio station authorization.¹⁶ DIRECTV readily acknowledges that its personnel began repositioning the satellite one day after DIRECTV applied for the STA request to relocate DIRECTV 3 without Commission approval of that modification. Accordingly, we find that DIRECTV’s unauthorized modification of the subject satellite apparently willfully¹⁷ and repeatedly¹⁸ violated Section 25.117(a) of the Rules.

7. In light of DIRECTV’s apparent willful and repeated violation of Section 25.117(a) of the Rules, we find that a forfeiture is warranted. Section 503(b)(1)(B) of the Act states that any person who willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable for a forfeiture penalty.¹⁹ The Commission is authorized to

¹² Status Letter at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ None of the exceptions to the requirement of prior Commission approval for modifications, as described in Section 25.118 of the Rules, 47 C.F.R. § 25.118, apply here.

¹⁷ Section 312(f)(1) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) (“*Southern California*”) (discussing legislative history regarding applicability of Section 312(f)(1) definition of “willful” to Section 503(b)).

¹⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to forfeitures assessed pursuant to Section 503(b) of the Act, provides that “[t]he term ‘repeated,’ ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Southern California*, 6 FCC Rcd at 4388.

¹⁹ 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(2).

assess a forfeiture of up to \$11,000 for each violation, or each day of a continuing violation, by a non-common carrier or other entity not specifically designated in Section 503(b), up to a statutory maximum of \$87,500 for a single act or failure to act.²⁰ In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²¹

8. The Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules establish a base forfeiture amount for the operation at an unauthorized location or frequency of \$4,000.²² However, we think that a substantial upward adjustment of this base forfeiture amount is warranted. As DIRECTV implicitly acknowledged in its October 3, 2003 STA request,²³ strict adherence to the rules that govern modification of satellite authorizations is critical to minimizing the risk of collision of satellites. Moreover, DIRECTV’s violation has continued since September 4, 2003, when DIRECTV began the process of repositioning the satellite.²⁴

9. In addition, in the *Forfeiture Policy Statement*, the Commission made clear that companies with higher revenues, such as DIRECTV,²⁵ could expect forfeitures higher than those reflected in the base amounts:

[O]n the other end of the spectrum of potential violations, we recognize that for large or highly profitable communication entities, the base forfeiture amounts ... are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level.... For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts ..., we intend to take into account the subsequent violator’s

²⁰ Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation by cases not covered by subparagraph (A) or (B), which address forfeitures for violations by broadcast licensees and common carriers, among others. See 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under Section 503(b)(2)(C) to \$11,000. See 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000).

²¹ 47 U.S.C. § 503(b)(2)(D); see also *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17100 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

²² *Forfeiture Policy Statement*, 12 FCC Rcd at 17114; 47 C.F.R. § 1.80(b)(4), Note to Paragraph (b)(4): Section I. Base Amounts for Section 503 Forfeitures.

²³ See *supra* n. 9 and accompanying text.

²⁴ In successive correspondence, DIRECTV notified IB of four additional maneuvers involving the subject satellite. See Letters from James H. Barker, counsel to DIRECTV, Inc., to Thomas S. Tycz, Chief, International Bureau, Satellite Division, Federal Communications Commission (Nov. 21, 2003; Dec. 8, 2003; Dec. 30, 2003; and Jan. 15, 2004).

²⁵ DIRECTV, Inc. reported that it had total revenues of \$7.193 Billion in 2002. See <http://biz.yahoo.com/ic/47/47725.html>.

ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.²⁶

10. We believe that the factors cited above justify the maximum proposed forfeiture. Further, while we find DIRECTV's efforts to ensure compliance with the provisions of Section 25.117(a) of our Rules in the future commendable, such a post-remedial measure does not lessen, mitigate, or excuse its past violation.²⁷ Considering all of the enumerated factors and the particular circumstances of this case, we conclude that DIRECTV is apparently liable for a forfeiture in the amount of the statutory maximum of \$87,500 for its apparent willful and repeated violation of Section 25.117(a) of the Rules.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules, DIRECTV, Inc. **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eighty seven thousand five hundred dollars (\$87,500) for willfully and repeatedly violating Section 25.117(a) of the Rules.

12. **IT IS FURTHER ORDERED THAT**, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this *Notice of Apparent Liability for Forfeiture and Order*, DIRECTV, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number ("FRN") and the NAL/Acct. No. referenced in the caption.

14. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

²⁶ *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100. See also 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

²⁷ See e.g., *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *Station KGVV, Inc.*, 42 FCC 2d 258, 259 (1973).

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁸

16. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture and Order* shall be sent by first class mail and certified mail return receipt requested, to James R. Butterworth, Senior Vice President, Communications Systems, DIRECTV, Inc., 2230 East Imperial Highway, El Segundo, CA 90245, and James H. Barker III, Esq., Latham & Watkins, LLP, 555 11th Street, NW, Suite 1000, Washington, D.C. 20004.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁸ See 47 C.F.R. § 1.1914.